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648015—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 207

ARLENE COATS, A PARTNERSHIP CONSISTING OF SIDNEY BERKENFELD AND BENJAMIN PREPON, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. pp. 14–20) is reported at 297 F. 2d 546.

JURISDICTION

The order of the United States Court of Claims dismissing the petition was entered on January 12, 1962. A petition for rehearing, timely filed, was denied on April 4, 1962. The petition for a writ of certiorari was filed on June 25, 1962. The jurisdiction of this court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in light of the six-year statute of limitations governing suits filed in the Court of Claims, that Court properly dismissed an action first brought by petitioner in 1960 in order to set aside a 1949 decision of the Armed Services Board of Contract Appeals.

STATUTES AND CONTRACT PROVISIONS INVOLVED

1. Section 2501, Title 28, United States Code, in pertinent part provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

2. The Wunderlich Act of May 11, 1954, c. 199, § 1, 68 Stat. 81, 41 U.S.C. 321, provides:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

3. Contract No. W30-280-QM-2753 in pertinent part provides:

14. REVISION OF PRICE:

(a) The prices fixed herein may be increased or decreased in accordance with this Article.

* * * * *

(e) Disagreements.—If * * * the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article entitled "Disputes", and the prices so fixed shall remain in effect for the balance of the contract notwithstanding any other provision of this Article.

* * * * *

ARTICLE 16. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall mail to the Contractor a written notification of his determination. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract.

STATEMENT

On June 28, 1946, petitioner and the Department of the Army entered into contract No. W30–280–QM–2753 for the manufacture and purchase of 125,000 overcoats at a unit price of $19.25. By Supplemental Agreement dated November 29, 1946, the unit

price was reduced to $19.00. The contract contained a price revision article, which provided that if the petitioner and the government's contracting officer were unable to agree upon revised prices, such would be deemed a disagreement as to a question of fact to be disposed of in accordance with the "Disputes" article. That article provided for the initial determination of the dispute by the Contracting Officer, with a right of "appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties." (*Supra,* p. 3.)

Pursuant to the "Revision of Price" article, petitioner submitted required cost data for examination by the Contracting Officer. Having been unable to reach an agreement with the petitioner as to revised prices, the Contracting Officer, on December 5, 1947, after making appropriate findings, fixed the unit price at $15.05. In supplemental findings of fact the Contracting Officer, on April 6, 1949, reaffirmed the propriety of that unit price. On December 14, 1949, timely appeal having been taken, the Armed Services Board of Contract Appeals recommended to the Secretary of the Army, successor to the Secretary of War, that the unit price be fixed at $15.29. This decision of the Board was approved and adopted by the Secretary on December 21, 1949.

The Petitioner has been paid for the 125,000 overcoats delivered under the contract at a price of $15.29 per unit, or $1,911,250 in all. The present suit was filed by petitioner against the United States in the Court of Claims on April 11, 1960, or more than 10½ years after the 1949 decision established the unit price

at $15.29. In this suit, petitioner, challenging that decision, seeks to recover the difference between the price paid it for the 125,000 overcoats and the original contract price of $19 per unit. Summary judgment was entered in favor of the United States. The Court of Claims noted in a *per curiam* opinion that "It is clear that [petitioner] cannot recover because its claim is barred by the statute of limitations." 297 F. 546, 547.

ARGUMENT

The Court of Claims was clearly correct in deciding that petitioner's claim was barred because it was not filed within the six-year period provided by 28 U.S.C. 2501. There is, accordingly, no occasion for further review by this Court.

1. It has long been settled that when Congress consents to suit against the United States, the express statutory limitations and conditions governing such suits are an integral part of the Congressional consent and must be strictly observed. *Soriano* v. *United States*, 352 U.S. 270, 276; *McMahon* v. *United States*, 342 U.S. 25, 27; *United States* v. *Sherwood*, 312 U.S. 584, 587. Indeed, "no rule is better settled than that the United States cannot be sued except when Congress has so provided" (*Ickes* v. *Fox*, 300 U.S. 82, 96) and that its liability "cannot be extended beyond the plain language of the statute authorizing it." *Price* v. *United States and Osage Indians*, 174 U.S. 373, 376; *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686.

The pertinent statute here, authorizing the institution of suit against the United States in the Court of

Claims, provides: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501.

Petitioner's claim accrued on December 21, 1949, the date on which—all of the contractual events having occured—petitioner could have first instituted suit.[1] *Ball* v. *United States*, 137 F. Supp. 740 (Ct. Cls.), certiorari denied, 352 U.S. 827. Accordingly, the six-year period of limitations expired on December 20, 1955. Since the present suit was not filed until 1960, the court below was plainly required to dismiss it as time barred.

In an endeavor to escape the explicit six-year period of limitations, petitioner contends that the Wunderlich Act, enacted in May, 1954, *supra* p. 2, automatically extended the period of limitations for another six-year period, or at least until May, 1960.[2] The short answer is that there is nothing in the Wunderlich Act even suggesting such an extension of the limitation period. And *Soriano* v. *United States*, 352 U.S. 270, makes it plain that there will be no tolling

[1] The decision of the Armed Services Board of Contract Appeals was approved by the Secretary of the Army on December 21, 1949.

[2] The acceptance of this argument would require the allowance of a new six-year limitations period in regard to suits against the United States each time an allegedly new remedy is afforded private claimants, no matter how stale the claim. In any event, petitioner—between May 1954, when the act was passed, and December 20, 1955—could have instituted an action within the six-year period prescribed by 28 U.S.C. 2501. But petitioner failed to do so, filing suit first in 1960.

or extension unless Congress expressly provides for it.

2. The other argument raised in the petition (Pet. 8–11) concerns an asserted conflict in the lower courts as to whether, under the Wunderlich Act, the reviewing court may upset the administrative determination without regard to the evidence adduced before the administrative authority and solely on the basis of *de novo* evidence presented to the court. But this problem is in no way involved in the present case. All that is involved here, certainly at this stage of the litigation, is the propriety of the ruling below that petitioner's claim was not timely filed. That ruling, we have shown, is clearly correct.

CONCLUSION

For the foregoing reasons, we respectfully subinit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.
MORTON HOLLANDER,
EDWARD BERLIN,
Attorneys.

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